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# NATIONAL ASSOCIATION OF THE DEAF

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March 31, 1997

Mr. William F. Caton  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

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MAR 28 1997

Federal Communications Commission  
Office of Secretary

Re: Reply Comments in the Matter of Closed Captioning and  
Video Description of Video Programming, Implementation of  
Section 305 of the Telecommunications Act of 1996, Video  
Programming Accessibility  
MM Docket No. 95-176

Dear Mr. Caton:

Enclosed herewith are one original plus six copies of the Reply Comments of the National Association of the Deaf in the above captioned proceeding. In addition, a diskette containing these comments is enclosed, formatted in Microsoft WORD. WP 5.1 is no longer installed on our office computers.

Sincerely,

Karen Peltz Strauss  
Legal Counsel for Telecommunications Policy

Enclosures  
cc: ITS

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**MAR 28 1997**

Federal Communications Commission  
Office of Secretary

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

In the Matter of )  
 )  
Closed Captioning and Video )  
Description of Video Programming )  
 ) MM Docket No. 95 -176  
Implementation of Section 305 of the )  
Telecommunications Act of 1996 )  
 )  
Video Programming Accessibility )

**REPLY COMMENTS OF**

**THE NATIONAL ASSOCIATION OF THE DEAF**

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March 31, 1997

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## SUMMARY

Until such time that captioning of video programming is considered an integral part of video production and exhibition, video providers and owners will continue to seek extensive exemptions from the Commission's captioning requirements. Toward this end, the FCC's rules should strive to create a level playing field for all providers and owners, by imposing captioning mandates that give these entities the leverage to reject programs that are not captioned. History has shown that market forces will not, by itself bring about the significant levels of captioning envisioned by Congress. Rather, the FCC must issue rules to fulfill Congress' goal of ensuring full access to video programming for Americans who are deaf and hard of hearing. Toward that end, we propose that the FCC adopt the following principles in its determinations for when exemptions are appropriate:

- Because the economic situation of each provider is so different, the FCC should grant few blanket exemptions. Rather, the FCC should carefully consider the individual circumstances of each programming provider.
- The FCC should consider granting partial or limited exemptions, when appropriate.
- Providers should be required to demonstrate that they have made a good faith effort to comply with the captioning requirements before qualifying for an exemption. This will include making efforts to modify conflicting contractual clauses and fully reviewing the range of captioning options.
- The FCC should grant exemptions for only limited periods of time.
- The FCC should not grant exemptions for programming categories where captioning already exists.
- The date of the enactment of Section 713 should determine the applicability of contractual clauses that may conflict with the captioning mandates.
- Blanket exemptions should not be granted where expediency is the principal reason for such exemptions.

- Low ratings, by themselves, should not result in the granting of an exemption.

We reemphasize our objections to blanket exemptions for short form programming, advertisements, sports, weather, and music programming, and respond that an exemption of five years for start up networks would result in these networks seeking further delays at the end of that time.

With respect to compliance issues, we reiterate our proposals for compliance with the captioning rules to be enforced through providers, and for compliance to be reviewed channel by channel, on a weekly basis. We note that many others have agreed on the need for minimum standards of captioning and quality. We again ask the FCC to require that all previously captioned programs be shown with those captions, and that captioning remain workable with digital technologies. Finally, we propose that the Commission create a Web site with information on the captioning requirements, possible captioning difficulties, and avenues of redress for captioning grievances. We propose that petitions for undue burden exemptions be posted on that site and that the Commission accept objections to such petitions through an Internet address.

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**REPLY COMMENTS OF**

**THE NATIONAL ASSOCIATION OF THE DEAF**

**I. Captioning as an Integral Part of Program Production and Exhibition**

Most of the programmers and networks who submitted comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in this proceeding urged the Commission to grant exemptions for certain types of programming.<sup>1</sup> Because video programming was originally created without captioning, unfortunately, for the most part, these parties view captioning as a feature which is "added-on," rather than one that is integral to the nature of video programs. The consequence is that, rather than consider captioning as just another component of video production and exhibition, captioning is apparently perceived as something "extra," for a

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<sup>1</sup> Among other requests, parties have sought exemptions for commercial advertising, interstitials and promotional advertisements, overnight news, regionally and locally produced sports coverage, foreign programming, live music, PEG programming, and library programming. See generally, Comments of ABC at 4, CBS at 4, 12-13; United States Satellite Broadcasting Company (USSB) at 10-14; DIRECTV at 8-13.

special population, even though time and again, the record has shown this population to be at least ten percent of television viewers. With this approach, programmers and owners commenting on this proceeding typically calculate the cost of production, and then determine whether it is economically wise for them to append captioning costs to the bottom line of their budgets. It is this approach that brings so many parties to the FCC complaining that captions are too expensive. Yet it is not this approach which Congress contemplated through the passage of Section 713.

Congress' enactment of Section 713 reflects the need to consider the communication access needs of all Americans in our nation's policies on video programming. Among other things, this requires incorporating access during the initial stages of new program production and development. Indeed, such an approach is consistent with our nation's overall policies for telecommunications access for individuals with disabilities, as reflected in Section 255 of the Communications Act.<sup>2</sup> Passage of both Section 713 and Section 255 are a response to the fact that for endless decades, individuals with disabilities were confronted by insurmountable communication barriers, which have prevented such individuals from becoming fully integrated into all aspects of our society. Congress' clear and unequivocal mandates for full access of all new programming and for maximization of access to library programming is designed to remove these barriers. Toward this end, video programmers must begin to see closed captioning not as a variable option in the production process, but as a fixed aspect, whose costs are factored in with

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<sup>2</sup> Section 255 requires telecommunications manufacturers and service providers to make equipment and services accessible to individuals with disabilities. Toward this end, much emphasis by manufacturers and service providers alike has begun to be placed on principles of universal design, which require companies to design and develop their offerings to be accessible to the broadest range of possible users, including individuals with disabilities. In the context of video programming, universal design dictates that as much programming as possible be accessible to as many individuals as possible.



the costs and budgets for their end products. See e.g., Comments of Media Captioning Services (MCS) at 9.

It is critical for the FCC to understand these basic Congressional goals when crafting exemptions under Section 713. Indeed, incorporation of captions as a matter of standard practice should eliminate the need for most of the exemptions requested.<sup>3</sup> Several captioning agencies with significant experience who have responded to this proceeding report that current captioning costs, when compared to the costs of producing programs or the revenues derived therefrom, are actually quite minimal. See e.g., Comments of National Captioning Institute (NCI) at 3; WGBH Educational Foundation (WGBH) at 3. Moreover, the reach of captioning services is considerable. As NCI states, by the end of this century, virtually all TV households will be able to receive captioning. Accordingly, we agree with NCI that exemptions should be narrowly limited to situations where captioning would either “make no sense,” or where the imposition of a captioning mandate would preclude the production or distribution of the program. Comments of NCI at 7, 10.

We agree with the National Council on Disability (NCD) that the 20 year history and experience with video captioning, the existence of demonstrated technologies for captioning, and an awareness by industry as to captioning requirements makes it unnecessary to consider a long phase-in period with extensive exemptions. See Comments of NCD at 2; see also Comments of Massachusetts Assistive Technology Partnership Center (MATP) at 2. As noted by NCD, so long

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<sup>3</sup> We make special mention of the “de minimus” exemption requested by the National Cable Television Association (NCTA) for new programming. NCTA’s suggestion that there be an overall exemption for as much as ten percent of all such programming significantly departs from these Congressional goals for full access. See Comments of NCTA at 13. A similar exemption from the requirement to provide a sound track for programming would be unheard of.

as the exemptions granted by the FCC in its final rules cover "the chief programming categories in which unusual difficulty or expense can be feared," implementation of the captioning rules within a shorter time period - i.e., the three to four year period we proposed in our initial comments - should not result in burdens for entities charged with captioning the remaining programs. See Comments of NCD at 2.

## II. Definitions

Commenters to the NPRM have raised a number of questions about scope of "new" programming under the Commission's rules. We address each of these in turn:

1. Programs that have been modernized - The National Council on Disability points out that the cost of captioning programs which have been colorized, remastered, or otherwise modernized with new technology may be insignificant when compared to the overall cost of modernizing a program. Comments of NCD at 7. For this reason, we urge the FCC to classify such programming as "new" for purposes of the captioning requirements. This would be consistent with other nondiscrimination laws, which impose accessibility requirements on places of public accommodation when they remodel or alter their facilities. See 28 C.F.R. § 36.401 et seq., implementing Title III of the Americans with Disabilities Act.

2. Programs exempt during the phase-in period - Under the FCC's scheme, only a percentage of programs must be captioned in any given year for the next several years. Some commenters have put forth the suggestion that programs which are not captioned during this period be considered library, rather than new programming. Comments of the National Association of Broadcasters (NAB) at 10-11. The Act could not be clearer on this point. Section 713(b) plainly requires "video programming first published or exhibited after the effective date of

[the FCC's] regulations [to be] fully accessible through the provision of closed captions."

(emphasis added). To rule otherwise would violate the letter of the law. The result would be even more delayed access to such programming, and if some commenters would have their way, no guaranteed access to such programming at any point in the future.

3. Programming first published or exhibited on television - Encore suggests that new programming be defined as programming that is first published or exhibited in theaters, rather than programming first published or exhibited on television. Comments of Encore at 9. In support of this theory, Encore notes that the first broadcast appearance of a theatrical film on cable channels is typically one to two years after the production is completed, and that Congress only intended for there to be a few months gap between the time that production is completed and the time a film is first exhibited on a cable or broadcast station. First, there is nothing whatsoever in the legislative history of Section 713 to support Encore's argument. Rather, a common sense reading of the Section 713's language points to exhibition of a program on television as defining the line between new and library programming. Second, the lag time between the enactment of Section 713 and the implementation of its provisions by the FCC is 18 months, the approximate time, according to Encore, that it takes for films exhibited in theaters to reach cable stations, and more than enough time to put providers on notice that they will have to exhibit those films with captions.

For similar reasons, we oppose the suggestion made by HBO that "new" programming be defined as programming "first publicly distributed in its original form in any medium after the effective date of the rules." Comments of HBO at 6. Put simply, the Commission should not depart from the clear language and intent of the statute requiring new programming to be defined

as programming first published or exhibited on television after the effective date of the regulations.

### III. Library Programming

Some video providers have requested the FCC not to require captioning for library programming, and have asked the FCC to allow market forces to bring about such captioning. Comments of NCTA at 29; CBS at 23; DIRECTV at 10-11. This approach has already been tried, and put simply, it has already failed. Enactment of the Television Decoder Circuitry Act of 1990 was an attempt by Congress to provide an incentive for programmers to increase their captioning levels. Because a broader audience would now be able to receive and display captions, it was presumed that program providers would step up to meet that demand. Yet, nearly seven years after passage of that Act, the levels of captioning on basic cable stations have scarcely increased. Indeed, it was this very fact which served as the impetus for Congress to pass Section 713's requirement for access to library programming. To ignore this mandate by failing to issue rules for access to library programming would be an action in flagrant violation of the law. There is no need, as NAB would otherwise have us believe, to "observe developments in the market before determining that additional captioning rules for library programming are necessary." Comments of NAB at 11. The need for such rules has already been firmly established.

Some providers also seem to question the marketability of library programs, and suggest that distributors or providers will have little economic incentive to caption such programs because they have little marketability. For example, ABC suggests that program providers will prefer newer, captioned programs as library programs lose their appeal. Comments of ABC at 9. Similarly, NCTA asserts that library products often do not have multi-year life cycles. Comments

of NCTA at 28. The existence of various stations whose programming solely or primarily consists of library material (Nickelodeon, American Movie Classics, Sci-Fi Channel, TV Land, the Game Show Network<sup>4</sup>), as well as the existence of other stations whose programming line-ups include a significant amount of such library programming (A&E, USA, TNT), negates these claims.<sup>5</sup> Rather, such stations demonstrate the strong demand for library programming and the considerable interest of providers in meeting that demand. Deaf and hard of hearing individuals have a similar interest in viewing such programs and therefore should not be denied that access.

#### IV. Measure of Compliance

Primary Responsibility - Much debate took place in the comments to the NPRM regarding which parties should be held primarily responsible for compliance with the captioning rules. We reiterate the view contained in our initial comments that video programming providers should be ultimately responsible for compliance with these rules, but should apportion the actual responsibility for incorporating captions in contractual arrangements with program owners, including syndicators and advertisers. Comments of NAD at 3.<sup>6</sup> A few parties to this proceeding have raised concerns about this approach, which we address below.

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<sup>4</sup> Indeed, the Game Show Network boasts that its main asset is a library of approximately 50,000 formerly aired game show programs which date back to the 1950's, and notes that more than 90 percent of its programming comes from this source. Comments of the Game Show Network, L. P. at ii,1.

<sup>5</sup> Similarly, video stores dedicate a good portion of their stores to extensive collections of old programs, demonstrating the public interest in viewing such programs. If a television provider considers it economically sound to air public domain programming, and is able to sell commercial time and attract viewers by doing so, then it can also pay for the captioning of such programming.

<sup>6</sup> Thus, although video programming providers will be obligated to caption some of their programs, we agree with Californians for Television Access and Self Help for Hard of Hearing People - California (CTA/SHHH) that programming providers should serve more as "enforcers" of compliance with the rules than as providers of captioning for all programming. Comments of CTA/SHHH at 4.

First, these parties suggest that networks and MVPDs cannot simply refuse to purchase non-captioned programs because contracts between studios and networks may exist which did not require such captioning. Comments of Ameritech New Media, Inc. (Ameritech) at 10, n.16 ; Encore at 6. The captioning exemption in Section 713 is not intended to enable providers to circumvent their captioning obligations wherever a contract does not explicitly provide for captioning. In the past, captioning has frequently not been part of the licensing agreements for television programs, yet producers or exhibitors of those programs have added captions anyway. Moreover, where a movie or program without captions must be accepted by virtue of a contract already in place, the responsibility to caption should shift to the program provider, it should not be eliminated entirely.

Second, these parties argue that the programming marketplace is a seller's market, and that program networks do not have the leverage with which to require captioned masters from studios. Comments of Encore at 6; Bellsouth Corp. et. al. at 8; Ameritech at 7.<sup>7</sup> This argument fails to recognize that, while the leverage to demand captioned prints may not exist now, once such prints are required for all programming, the playing field will be level, and providers will in fact have the leverage to reject noncaptioned programs. If rules are in place requiring captions, then studios and producers will not be in a position to refuse to caption their product, as they will not have any buyers to choose from. With all providers (networks, channels, and other programming providers) equally subject to the same captioning mandates, any provider will be

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<sup>7</sup> Encore states "If a program network desires to stay in business and provide consumers with the type of quality programming they desire (with big stars and big budgets), it does not realistically or competitively have the luxury of refusing to buy such high quality films even if the studios and producers refuse to caption them." Encore at 6.

able to exert the needed control to demand which programs are captioned.<sup>8</sup> Only if extensive exemptions are granted for various types of programming, and if the rules are not applied equally would this scenario not operate effectively.<sup>9</sup>

We also agree with NCI that the obligation to caption national and regional programming should be placed on syndicators who control the program series, even though the ultimate responsibility lies with the 100-150 stations who carry those episodes. As NCI notes, the cost of captioning individual episodes is comparatively low at the syndicator level, but may be high for individual channels. Comments of NCI at 13. The level playing field discussed above will enable the captioning responsibility to be allocated at the point in the video production distribution process where it is economically logical.

Channel by Channel - Strong support existed among commenters to the NPRM for judging compliance with the captioning thresholds channel by channel. See Comments of MPAA at 5; US West at 14-15; A & E Television Networks, the History Channel and Ovation at 19; VITAC at 5; CBS at 10; WGBH at 5-6; NCD at 6. As NCTA points out, a system-wide assessment would require an analysis of all networks in the same system; we agree that such detailed tracking would be difficult for both small systems and consumers. NCTA at 15; see also Cox Enterprises, Inc. at 7 (a system wide approach would represent a "logistical nightmare" for

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<sup>8</sup> As noted by WGBH, when there is no question as to the requirement to caption, "the decision to include captioning costs in production budgets is a simple one, and costs are passed on invisibly to the ultimate funder." Comments of WGBH at 4.

<sup>9</sup> Ameritech confirms this argument in noting that some programming may be so popular that its owner may not agree to provide captioning "unless each and every program provider, acting in concert, required it." Comments of Ameritech at 7. Ameritech's conclusion that "this kind of unanimity is unlikely" is simply incorrect, given the mandate of Section 713. Moreover, the very fact that Section 713 does contain a mandate for universal captioning access dismisses the

cable operators). Because different programs are received by different audiences, a system-wide requirement also would likely result in a disproportionate amount of captioning for different audience sectors. As we noted in our initial comments, a channel by channel requirement would spread the obligation to caption programs more evenly among all video providers.

Weekly Reviews - In our initial comments, we proposed that compliance with the captioning mandates be measured on a weekly basis. Many parties commenting on this proceeding agreed with this approach. See Comments of VITAC at 5; WGBH at 6; Northern Virginia Resource Center for Deaf and Hard of Hearing Persons (NVRC) at 3. Other commenters suggested much longer time periods, such as a quarterly (comments of NAB at 5) or annual review (Comments of NCTA at 16-17). Determining compliance over such lengthy time periods is likely to be unwieldy. Although we understand that “minor anomalies and fluctuations” may occur from week to week (comments of Encore at 10), we believe that these fluctuations can be handled through other adjustments in the scheduling of captioned programming.

Previously Captioned Programs - Commenters generally agreed with the Commission’s decision to extend Section 76.606 so that all providers retransmit previously captioned programs intact. See e.g., Joint Comments of Bell Atlantic and NYNEX at 6; USSB at 15-16; Consumer Action Network (CAN) at 14; Ameritech at 13.<sup>10</sup> Toward this end, we support the proposal of the National Council on Disability (NCD) for the creation of a national captioning registry for television programming. As NCD notes, the existence of such a registry would avoid duplication

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argument, raised by Ameritech, that such unanimity would create antitrust issues. See Comments of Ameritech at 7, n.12.

<sup>10</sup> Although NAB asserts that there is no need for a rule requiring the retransmission of usable captions (Comments of NAB at i), unintentional omissions of captioned data, failure to monitor



in captioning, minimize the costs of accumulating accessible video resources, and ensure that captions are shared to the maximum possible degree. Comments of NCD at 6.

Additionally, we again stress the importance of a rule requiring previously captioned videos which *have been edited* to be transmitted with those captions, without consideration to compliance with the captioning schedules. The assertions that such reformatting can cost thousands of dollars per program hour (Comments of MPAA at 8) is disputed by all captioning services who submitted comments on this issue. These agencies report that the costs of reusing captions is only a percentage of the costs of captioning a program for the first time. See e.g., Comments of NCI at 8; WGBH at 7. Moreover, NCTA's suggestion that reformatting requires a lead time of many weeks (Comments of NCTA at 7-8), is simply untrue; captioning services report that generally it is faster to reformat than to insert initial captions, and that reformatting services can be provided in a matter of days. Finally, as we noted in our initial comments, new technologies are making reformatting less costly and easier to perform. For example, captioning services can bring down costs and even eliminate the need for reformatting by leaving gaps around dialogue the first time they caption, so that editing processes do not cut off captions.<sup>11</sup> A rule that mandates the exhibition of previously captioned programming is needed to create even more incentives for programmers, providers, and captioning agencies to develop new and inexpensive methods to facilitate the reformatting process.

Digital Programming - We reemphasize the need to establish rules to ensure that

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caption transmissions, and neglect to secure the captioned version repeatedly demonstrate the need for such a rule. See also Comments of WGBH at 9.

<sup>11</sup> Thus, NCTA's assertion that any editing can throw captions off is not always true. Comments of NCTA at 7.

captioning remains workable with new digital technologies. WGBH reports that television manufacturers are already studying the means by which enhanced captioning capabilities will be incorporated into digital TV and further reports that "[t]he captioning requirements are so minor in comparison to the overall complexity of ATV that no one would say captioning is impeding the development of new technology." WGBH at 8.<sup>12</sup>

#### V. Captioning Quality

Others to this proceeding agree that the quality and accuracy of captioning will determine the extent to which providers are in compliance with the captioning mandates. Comments of CAN at 15, Comments of VITAC at 9-13; Comments of NVRC at 7. We disagree with the assertion by E! Entertainment Television, Inc. (E!) that standards defining quality and accuracy could stifle experimentation or delay the introduction of new technology that may improve captions. Indeed, such a statement could not be further from the truth. See Comments of E! at 7. Rather, acceptance of poor captioning quality is likely to perpetuate existing technologies, and result in captioning at the "lowest common denominator." Comments of VITAC at 13. In contrast, insistence on high captioning quality is more likely to encourage the development of new technologies that can more easily and effectively enable programmers to achieve that quality.

We agree with Media Captioning Services that the standard for real time captioning should be functional equivalence. Indeed, nationally broadcast live public affairs programs already

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<sup>12</sup> Thus, there is no need to consider MPAA's suggestion regarding separate captioning timetables for digital television. Comments of MPAA at 11-12. NAB agrees that separate schedules are unnecessary, and notes that because "captioning data is inherently associated with a particular program, even in the digital world, captions will continue [to] be delivered along with that program." Comments of NAB at 9. Indeed, to establish such separate requirements would be in violation of the Decoder Circuitry Act of 1990, which requires the Commission to ensure that

meet this standard, by using use real time captioning. As MCS notes, and as we discussed in our initial comments in this proceeding, electronic newsroom captioning (ENR) cannot begin to deliver the level of accuracy or completeness required by a functionally equivalent standard, because there is no access to so much of the program.<sup>13</sup> As noted by VITAC, the most that can be said for ENR is that it is better than nothing. Comments of VITAC at 10. We agree with VITAC that this is not the standard that we should strive for.<sup>14</sup>

## VI. Exemptions

### A. Basic Principles

Based on the comments received in this proceeding, we offer here a number of guidelines for the Commission's use in reviewing and responding to the various exemptions requested:

#### 1. The FCC Should Consider the Individual Circumstances of Each Programming Provider.

Although Section 713(d)(1) permits the FCC to exempt categories of program by regulation, the Commission should keep in mind that the economic situation for each programming provider is significantly different. (See, e.g., Comments of NCD at 3). For

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closed captioning services continue to be available as new video technologies are developed. 47 U.S.C. § 330(b).

<sup>13</sup> Comments of MCS at 5. We disagree however, that the benchmark for determining whether the standard of functional equivalence has been met is whether more than 20% of a production is not captioned, as this percentage is far too high. See Comments of MCS at 16. We ask readers to imagine a program with 20% of the audio content missing; such performance would surely be fined as being in violation of the FCC's broadcasting requirements.

<sup>14</sup> We cite here to the comments of MATP at 2, n.1, where they report that there are already 542 court reporters certified as real time reporters (CRR) and hundreds more registered as professional reporters with real time captioning skills (RPR). MATP reports that more than 1000 individuals take the CRR examination each year. As we noted in our initial comments, when real time captioning requirements go into effect, these numbers will continue to grow to meet the demand for these skills.

example, a requirement of captioning for regional sports programming may be burdensome for a local university, but well within the ability of a national provider. Thus, to exempt all such programming would be inconsistent with Congressional intent. Rather, it would be more appropriate to consider the individual circumstances of providers seeking such exemptions.

## 2. Partial Exemptions Should be Granted, When Appropriate

The Commission should grant partial or limited exemptions, rather than full exemptions, for certain kinds of video programming. See e.g., Comments of NCD at 5. For example, a partial exemption may be appropriate for some foreign language programming. In response to its NPRM, numerous providers of Spanish programming raised concerns about the absence of laws requiring captioning and television decoders in the foreign nations that produce their programming, and about the very small budgets available for those programs. See Comments of Univision at 2; Grupo Televisa at 5-6. Nevertheless, other statements made by these stations demonstrate that a total exemption for this type of programming is unnecessary. Univision, a major Spanish language network affiliated with 39 television stations, has expressed its support and interest in complying with the captioning mandates, noting that it merely seeks "sufficient flexibility and time to make closed captioning a reality for their Spanish speaking audiences."<sup>15</sup> Similarly, VITAC reports that it would be possible to begin captioning a significant amount of pre-recorded Spanish language program within a few months. Comments of VITAC at 8. A

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<sup>15</sup> Captioning of Spanish language programs will have the added educational benefit of helping both deaf and hearing individuals to learn Spanish as a second language. Being able to read the verbal content of foreign language programs facilitates an understanding of the language.

partial and temporary exemption for such programming would steer clear of the all or nothing approach advocated by so many providers, and afford the flexibility needed by these stations.<sup>16</sup>

### 3. Providers Should Be Required to Demonstrate Good Faith Compliance Efforts

With respect to individual petitions for relief from the captioning rules, we support a requirement for providers to undertake a good faith effort to provide captions before securing an exemption. For exemptions founded on contractual clauses which are perceived as prohibiting captioning, this would require a program provider to exercise a concerted effort to obtain a modification of or release from such clause before receiving an exemption under 713(d)(2). See Comments of NCD at 4. Similarly, petitioners seeking an undue burden exemption based on cost should be required to demonstrate “that they have fully reviewed the range of known captioning options to determine whether their estimates of cost are in fact accurate.” *Id.*

### 4. Exemptions Should be for Limited Periods of Time

As noted in our initial comments, exemptions should be granted for limited time periods only. Indeed, application of the captioning rules should turn on *when*, not *if*, these rules will be enforceable for a particular type of programming. In devising its final rules, we urge the Commission to keep in mind that consumers should not lose at both ends: if exemptions are granted, video program providers should not be entitled to an extensive phase-in period, and vice versa.

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<sup>16</sup> We do oppose the five year delay for Spanish language stations that has been proposed by Univision as too long a delay for implementation of the captioning rules. Univision and Grupo Televisa suggest that foreign producers would not be likely to incur the cost of captioning just to be able to distribute those programs in the United States. Univision at 5; Grupo Televisa at 7. We question whether this is true, given the significant percentage of individuals in the United States who receive such programming. Indeed Grupo Televisa, S.A. reports that as much as 7.5% of the

5. No Exemptions Should be Granted for Programming Categories which Already Contain Captioning

No exemptions should be granted for programming in a category that is already captioned.<sup>17</sup> As we noted in our initial comments, the number of programs currently captioned should provide a floor for the new captioning thresholds contained in the FCC's rules. Stations should not be permitted to roll back their captioning percentages through new exemptions.<sup>18</sup>

6. The Date of the FCC's Rules Should not Determine Contractual Exemptions.

No exemptions should be granted with respect to contracts in effect on the date that the FCC's rules are enacted, as proposed by MPAA. Comments of MPAA at 20. Section 713(d)(2) clearly uses the date of enactment of the Telecommunications Act of 1996 to determine the applicability of such contracts.

7. Expediency Should Not Take Precedence over Legal Mandates.

Blanket exemptions for entire classes of video programming should not be granted simply because it may be more expedient to adopt those exemptions than it would be to conduct individual reviews of exemption petitions. Although a number of commenters have urged such action so that they need not file individual petitions,<sup>19</sup> the Act does not permit the FCC to grant

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American population speaks Spanish. It is not likely that a captioning requirement, in and of itself, will cause these producers to abandon so large a market.

<sup>17</sup> The Association of Local Television Stations, Inc. (ALTV) specifically requests the FCC not to require currently captioned programs to remain captioned. Comments of ALTV at 8.

<sup>18</sup> Other commenters to this proceeding similarly urge that the amount of captioning now available should serve as the baseline for new captioning required in the FCC's schedules. See e.g., Comments of WGBH at 4, Comments of CAN at 4; NCD at 3.

<sup>19</sup> For example, MPAA argues that all material of fifteen minutes duration or less should be exempt from the captioning requirements "for ease of administration." Comments of MPAA at 18.

exemptions on this basis alone. Only where captioning would prove to be economically burdensome can the FCC grant class exemptions under Section 713(d)(1).

#### 8. Low Ratings Should Not Produce Captioning Exemptions.

A few parties commenting have suggested that exemptions be granted where a particular type of programming, for example, overnight programming, produces only low ratings. See e.g., Comments of ABC at 4. Were this the standard, a significant amount of excellent television programming, most notably that exhibited on public broadcasting stations, would be denied to deaf and hard of hearing television viewers. Additionally, we note that, in the past, the 28 million deaf and hard of hearing individuals who rely on captioning have not been able to contribute to the rating statistics for such programming. Low ratings for programs, then, should not in and of themselves, provide reason enough to grant a programming exemption.

#### B. Specific Exemptions

Because our initial comments covered each of the exemptions proposed in the NPRM, we limit this section to addressing only a few of the specific comments made by other parties who responded to the NPRM.

##### 1. Start up Networks

NCTA has requested a five year delay in the implementation of the captioning rules for start up networks because, they claim, it "takes at least 5 years after launch for a new network to gain acceptance in the marketplace and to reach the breakeven point." Comments of NCTA at 19; see also Comments of Time-Warner at 2. The failure to include individuals with disabilities in the marketing of new telecommunications products and services, and in the garnering of

acceptance for those products and services, has long created barriers to access.<sup>20</sup> Neglecting to consider and address access needs during these early stages has typically resulted in the need to perform expensive and ineffective retrofits once the product or service is accepted and routinely used in society. NCTA's proposal for start up networks promises to repeat this pattern. Rather than incorporating access by captioning right from the start - and by making the provision of access an ordinary business practice - NCTA proposes that start up networks be exempt from captioning mandates for a whopping five years. The result is all too predictable: at the end of the five years, these networks will argue that captioning costs have not been built into their operating expenses and will seek further exemptions from the rules. Alternatively (or additionally), such networks will argue that all of the programming exhibited during this five year period should be permanently exempt as library programming. Surely this is not the result intended by Congress in Section 713. Moreover, it makes little sense that these new networks would want to exclude the millions of Americans who rely on captions from the markets that determine their acceptance during their first five years.

## 2. Interstitials, Promotional and other Short Form Programming

We reiterate our objection to a blanket exemption for short form programming. (contra Comments of NCTA at 21-22, ALTV at 10-11; NBC at 11.<sup>21</sup> Although we recognize that not

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<sup>20</sup> For this very reason, the Telecommunications Access Advisory Committee, which recently prepared a report for the U.S. Architectural and Transportation Barriers Compliance Board on ensuring access to new telecommunications equipment under Section 255 of the 1996 Communications Act, included in that report a suggestion that individuals with disabilities be included in the marketing stages of product development. "Access to telecommunications equipment and customer premises equipment by individuals with disabilities," TAAC Final Report (Jan. 1997) at 17, §§4.7(1) and (2).

<sup>21</sup> Some parties have proposed a blanket exemption for any program of 15 minutes duration or less. See e.g., Comments of C-SPAN and C-SPAN-2 at 9-10. We oppose such an exemption as



every network will have the resources to hire in-house captioning personnel, we do believe that many networks have more than sufficient resources to do so.<sup>22</sup> Also, our own experiences suggest that, notwithstanding assertions to the contrary,<sup>23</sup> most such programming, and specifically promotions about up-coming programs, do not contain graphics on the day and time of screening.

Many assume that the benefits of captioning interstitials are "negligible." See e.g., Comments of Pay-Per-View Network, Inc. D/B/A Viewers Choice at 7-8. This is simply incorrect. The dialogue contained in promotional advertising offers considerably more in terms of program content than do program listings, and caption viewers seek access to such information to make their programming choices. Any exemptions for economic or undue burdens for this program category should, therefore, be limited in time - we suggest a period of three years. By that time, implementation of the other captioning requirements will be well under way, and captioning of short form programming could easily be phased in.

### 3. Advertisements

We agree with ABC that advertisers have an economic incentive to reach as many customers as possible. Comments of ABC at 11. Because advertising can be extremely helpful to deaf and hard of hearing viewers, we reiterate our opposition to its exemption. In principle, we

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being overly broad, in that it will not only capture interstitials as suggested by these parties, but may also be interpreted to apply to advertisements and music videos.

<sup>22</sup> In this regard, we note that even Maryland Public Television, a public broadcasting station with far fewer funds than commercial networks, employs two full time staff members to caption its programs. Joint Comments at 6.

<sup>23</sup> NBC suggests that captions would add little information to the information already displayed on the announcements, Comments of NBC at 12; CBS reports that information on the time and date of upcoming programming is often provided graphically. Comments of CBS at 12-13.